Supreme Court, U.S.
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No. 92-1830

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1992

ROBERT D. SPICKLER,

Petitioner,

v.

KEY BANK OF SOUTHERN MAINE
and
RICHARD LUCAS,

Respondents.

On Petition for a Writ of Certiorari
to the Supreme Judicial Court
of the State of Maine

RESPONDENTS' BRIEF IN OPPOSITION

William D. Robitzek, Esq.
Paul F. Macri, Esq.*
BERMAN & SIMMONS, P.A.
129 Lisbon Street
P.O. Box 961
Lewiston, ME 04243
(207) 784-3576
Attorneys for Respondents
* Attorney of Record

LIST OF PARTIES
(SUPREME COURT RULE 29.1)

Pursuant to Supreme Court Rule 29.1, the following is a list of all parent companies and subsidiaries (except wholly-owned subsidiaries) of Respondent Key Bank of Southern Maine, now known as Key Bank of Maine:

KeyCorp

- Banking Subsidiaries
  - Key Bank of Alaska
  - Key Bank of Idaho
  - **Key Bank of Maine**
  - Key Bank of New York
  - Key Bank of Oregon
  - Key Bank of Washington
  - Key Bank of USA N.A.
  - Key Bank of Utah
  - Key Bank of Wyoming

- Financial Service Subsidiaries
  - Key Bank Life Insurance, Ltd.
  - Key Brokerage Company, Inc.
  - Key Corp Mortgage, Inc.
  - Key Pacific Mortgage, Inc.
  - Key Services Corporation
  - Trust & Investment Management Group
  - Key Trust Company
  - Key Trust Company of Alaska
  - Key Trust Company of Florida, N.A.
  - Key Trust Company of Maine
  - Key Trust Company of the Northwest

Key Trust Company of the West
Key Corp Leasing Ltd.
NCB Properties Inc.
Niagara Asset Corporation
Niagara Portfolio Management Corp.

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents Key Bank of Southern Maine and Richard Lucas respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Supreme Judicial Court of the State of Maine's opinion in this case.

That opinion is reported at 618 A.2d 204 (Me. 1992). The petition is frivolous because it presents no federal or constitutional issues.

JURISDICTION

Jurisdiction is erroneously invoked by petitioner under 28 U.S.C. § 1254(1) (conferring jurisdiction of cases in the courts of appeals). The Court lacks jurisdiction under 28 U.S.C. § 1257(a) because no federal question was raised below.

STATEMENT OF THE CASE

The respondents to a petition for certiorari are enjoined in Supreme Court Rule 15.1 to "address any perceived misstatements of fact or law set forth in the petition which have a bearing on the question of what issues would properly be before the Court if certiorari were granted." Here, the petition's statement of the case and statement of facts material to the five issues presented are replete with inaccuracies. It would take up too much space, as well as waste the Court's time, to point out all of the errors in petitioner's statement of fact. Respondents will therefore only point out the most egregious inaccuracies as they relate to each specific issue before the legal discussion of that issue below.

Respondents believe that the underlying facts are sufficiently and accurately summarized in the Decision of the Maine Supreme Judicial Court. *See* Appendix to Petition for Certiorari (C. App.) at 2-4. Respondents therefore incorporate

by reference the statement of facts and adopt the same as their Statement of the Case.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE COURT LACKS JURISDICTION BECAUSE THE PETITION FAILS TO RAISE A FEDERAL QUESTION.

A final judgment or decree rendered by the highest court of a State may be reviewed by this Court by writ of certiorari "where any title, right, privilege or immunity *is specially set up or claimed* under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States." 28 U.S.C. § 1257(a) (emphasis added). For there to be jurisdiction in the Supreme Court, it must affirmatively appear from the record that a federal question was raised in the state court. There should be no doubt from the record that the federal claim was presented in the state court and that the state court was apprised of the nature or substance of the federal claim. *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71 (1988). This Court has stated that:

> it is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.

Webb v. Webb, 451 U.S. 493, 496 (1981).

Raising a federal question for the first time in a petition for rehearing addressed to the highest state court is generally insufficient. *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945); *Bloeth v. State of N.Y.*, 82 S. Ct. 661, 7 L. Ed. 2d 780 (1962). Similarly, it is too late to raise a federal question for the first time in the notice of appeal to the Supreme Court or in the jurisdictional statement. *White River Lumber Co. v. Arkansas ex rel. Applegate*, 279 U.S. 692, 700 (1929).

When the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in state courts, unless the aggrieved party in the Supreme Court can affirmatively show the contrary. *Street v. New York*, 394 U.S. 576 (1969).

The requirement that a federal question be raised in state court is also embodied in Supreme Court Rule 14.1(h), which requires that a petitioner seeking review of a judgment of a state court state the basis for jurisdiction in his or her statement of the case, which must specify

> the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record or summary thereof . . . as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari.

The Petitioner has not complied with Rule 14.1(h) because he has failed to advise this Court when and in what manner the federal questions upon which he seeks review were raised. *See Webb v. Webb*, 451 U.S. at 495. The reason for this omission is obvious: no federal question was raised in the state courts.

A. Question I: Costs Levied Against Mr. Spickler.

Petitioner asserts that he was deprived of his property without due process because the Maine Superior Court levied costs against him on a count of the complaint relating solely to his wife. This question was first raised in a Motion for Reconsideration and Amendment of the Maine Supreme Judicial Court Decision. C. App. at 45. In that motion, petitioner alleged that the Maine Supreme Judicial Court did not decide whether petitioner was denied due process guaranteed by the Fourteenth Amendment to the United States Constitution. *Id.* Petitioner incorrectly asserts that this issue was presented to and decided by the trial court. *Id.* This due process issue was never raised either in the trial court or on appeal to the Maine Supreme Judicial Court. Thus, the Court did not overlook any point of law or fact that had been presented to it, and reconsideration was therefore not available under Maine law. Me. R. Civ. P. 76A(b)(1). The issue was raised for the first time in the motion for reconsideration, and that is too late. *White River Lumber v. Arkansas ex rel. Applegate.*

B. Question II: The RICO Claim.

Petitioner asserts that he was somehow deprived of his federal or constitutional rights because his motion to amend his complaint on the sixth day of trial to add a RICO count was denied.[1] This denial does not raise a federal question.

A denial of a motion to amend a pleading during trial is within the discretion of the trial court and not subject to review by the Supreme Court. *Nevada-California-Oregon R. Co. v. Burrus*, 244 U.S. 103 (1917). Likewise, a decision of a question of local pleading and practice is not open to review in the Supreme Court. *Washington v. Miller*, 235 U.S. 422 (1914). The motion to amend to add a RICO claim is clearly a matter properly governed by local pleading and practice rules. The denial of the motion is not the denial of a federal right, and this Court therefore lacks jurisdiction over the issue.

Petitioner's argument that the decision of the Maine Supreme Judicial Court is in conflict with a decision of a United States Court of Appeals is also incorrect. The Maine Supreme Judicial Court merely affirmed the denial of a motion to amend on grounds of untimeliness. The merits of the RICO claim were not at issue. The Seventh Circuit Court of Appeals cases cited by petitioner, *Masi v. Ford City Bank and Trust Co.*, 779 F.2d 397 (7th Cir. 1985) and *Haroco v. American Nat'l Bank and Trust Co. of Chicago*, 747 F.2d 384 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985), addressed whether a cause of action had been stated under RICO -- a question different

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[1]There is no support for Mr. Spickler's statement that "[t]here is compelling evidence that the handwritten documents were composed by Mr. Lucas after this lawsuit was initiated." Petition for Certiorari (Ptn.) at 15.

from whether petitioner should be allowed to amend his complaint to add a RICO claim on the sixth day of trial. There is therefore no conflict between the Seventh Circuit decisions and the Maine Supreme Judicial Court opinion.

C. Question III: The R.D. Realty Claim.

The third question raised by petitioner is whether he was denied due process when the court ruled that the claims of R.D. Realty, one of Mr. Spickler's corporations, could only be brought through a licensed attorney because they were claims of a corporation. Petitioner did not raise this due process argument either in the trial court or on appeal. This Court therefore is without jurisdiction to address this argument. Moreover, the ruling that R.D. Realty's claims must be brought through an attorney arose from petitioner's own motion to join R.D. Realty as a necessary party which was granted by order of March 15, 1991. The Superior Court granted the motion to add R.D. Realty as a necessary party "on the condition that a Maine lawyer appears and represents the interests of the corporation. Otherwise, it will be denied." No Maine lawyer ever entered his or her appearance for R.D. Realty. Moreover, the ruling on that motion, C. App. at 14-16, was based on local practice and procedure, and as such, is not subject to review by this Court. *See Washington v. Miller*, 235 U.S. 422 (1914).

The record reflects that petitioner was given a full opportunity to assert R.D. Realty's claims. C. App. at 14-15. This question was not properly raised and is in any event frivolous.

D. Question IV: The Injunction.

The fourth question raised by petitioner is whether enjoining him from filing lawsuits against the bank and its representatives without first obtaining the permission of a state court denied him equal treatment under the law. It is relevant to this issue that the evidence before the Superior Court on the motion for injunction established that Mr. Spickler was a prolific *pro se* litigator and that similar injunctions had already been entered against him in both federal and state courts. *See* Appendix to Brief in Opposition.

The issue whether the injunction denied petitioner equal treatment was not adequately raised in either the trial or appellate court. On appeal, Petitioner stated only that the injunction was "wrong because it . . . infringed on Appellants' constitutional right to equal treatment under the law, including the law that governs court process." Brief of Appellants at 141. Even in his Petition for Certiorari, petitioner does not cite any federal constitutional right that was allegedly violated, but refers only obliquely and generally to "the guarantee of equal treatment under the law" and "the Fourteenth Amendment." Ptn. at 28.

In order for such a constitutional claim to be raised, it must appear that some provision of the *federal*, as distinguished from the state, constitution was relied upon by the petitioner below, and the provision must be set forth. *Bankers Life & Cas. Co. v. Crenshaw*, 86 U.S. 71 (1988); *New York Central & H.R. Co. v. New York*, 186 U.S. 269, 273 (1902). If a claim is made that a state statute is "unconstitutional" or that it denies "constitutional rights," it will be assumed that reference is being made to the state

constitution and rights thereunder rather than to the federal Constitution. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67-68 (1928). Thus, a claim that "due process" has been violated is deemed to relate to a state due process clause. *Bowe v. Scott*, 233 U.S. 658, 664-65 (1914). Similarly, use of the phrase "full faith and credit" in state court proceedings without citation to the Federal Constitution or to any cases relying on the Full Faith and Credit Clause of the Federal Constitution is insufficient to preserve a federal issue. *Webb v. Webb*, 451 U.S. at 496. Petitioner's reference to his "constitutional right to equal treatment under the law" in state court is therefore insufficient to raise a federal question subject to this Court's review.

As the Maine Supreme Judicial Court noted in its decision, the Superior Court judicially noticed a number of lawsuits involving the Spicklers and their corporations. C. App. at 8. The Court further noted that "there is ample evidence in the record to support the trial court's factual determinations [in support of the injunction]." *Id.* Petitioner's present attempt to reargue the facts on which the injunction was based should be ignored.[2]

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[2]Many of Mr. Spickler's assertions in support of this argument are baseless. For example, his claim that he prevailed in this lawsuit is belied by the record. C. App. at 2-9. His assertion that the trial justice said that he held a "grudge" against him is false; the justice said only that he had a "grudging respect" for Spickler. Finally, there is no record basis for the three statements found on page 22 of the petition suggesting some sort of conspiracy by respondents, their counsel, and the Maine judiciary.

E. Question V: The General Due Process Claim.

Petitioner's claim that the Maine Courts were "in violation of 42 U.S.C. § 1983 by unlawfully disposing of [his] civil rights to due process under the color of state law", Ptn. at 23, was not raised on appeal or at any other stage of the state court proceedings, and is wholly unsupported by the record. If anything, the record reveals that the trial court bent over backwards to protect and help the Spicklers.

Petitioner's statement of fact in support of this issue is vague, inaccurate, and misleading. While it is true that petitioner raised 38 errors on appeal to the Maine Supreme Judicial Court, only seven were deemed worthy of discussion, and none can be reasonably construed as claiming "unequal treatment" by the trial judge. *See* C. App. at 38-44. The "unequal treatment" claim was not adequately raised in state court, and this Court therefore is without jurisdiction over the claim.[3] *Webb v. Webb*.

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[3]Mr. Spickler's unlikely claim that he was "physically shoved around by defendants' counsel", Ptn. at 23, during trial (which respondents absolutely deny) and that this behavior was sanctioned by the trial justice, even if true, presents no federal or constitutional issue for this Court's review. The Law Court correctly found that the trial court was "well within its discretion" in its handling of the alleged incident. C. App. at 7. The decision involved the Superior Court justice's control of the trial and was therefore based on adequate and independent state procedural grounds.

II. THE PETITIONER'S CLAIMS ARE INSUBSTANTIAL AND FRIVOLOUS.

The foregoing review of the petitioner's claims in this Court establishes that, even if the federal questions raised by petitioner had been properly raised in state court for purposes of this Court's jurisdiction, they are plainly unsubstantial and frivolous. *See Palmer Oil Corp. v. Amerada Petroleum Corp.*, 343 U.S. 390 (1952). Accordingly, the writ should be denied.

III. THERE IS NO SPECIAL AND IMPORTANT REASON FOR A WRIT OF CERTIORARI.

The Supreme Court will not grant certiorari to review evidence and discuss specific facts. *United States v. Johnston*, 268 U.S. 220, 227 (1925). There must be special and important reasons for granting certiorari. Supreme Court Rule 10.1; *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955). The issues must be important to the public, not just to the particular parties involved. *Rice v. Sioux City Cemetery* at 74.

It is readily apparent from the Petition that the decision of the Maine Supreme Judicial Court turned on the unique and extraordinary facts of this case. The decision will affect few except the parties. As is clear from a review of the 38 issues raised on appeal to the Maine Supreme Judicial Court, see C. App. at 38-44, the questions raised relate primarily to the conduct of the trial, evidentiary rulings, jury instructions, and pleading matters. As argued above, these are issues appropriately left to state court determination.

IV. THERE ARE ADEQUATE AND INDEPENDENT STATE GROUNDS TO SUPPORT THE DECISION.

The Supreme Court will not review a state court decision which is based on state law that is both adequate and independent. *Illinois v. Rodriguez*, 497 U.S. 177 (1990); *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935). As the Supreme Judicial Court's opinion reflects, there are independent and adequate state grounds supporting the decision of the Law Court on each issue raised by petitioner.

CONCLUSION

For the reasons set out herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Paul F. Macri, Esq.
BERMAN & SIMMONS, P.A
129 Lisbon Street
P.O. Box 196
Lewiston, Maine 04243-0961
(207) 784-3576
Attorney for Respondents

June 14, 1993

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APPENDIX A

STATE OF MAINE
CUMBERLAND, SS

SUPERIOR COURT
Civil Action
Docket No. CV-86-626
CV-86-967

ROBERT D. SPICKLER and
OLIVE S. SPICKLER,

Plaintiffs,

v.

ALAN J. LEVENSON, et al.,

Defendants.

ORDER AND DECISION

Defendants Alan Levenson and Alan Levenson as executor of the estate of Mayo Levenson and defendant Robert Dube have filed motions for summary judgment in their favor on the complaint of Robert Spickler and Olive Spickler and on the counterclaim in this case concerning alleged perjury at the 1982 trial in *R.D. Realty v. Dube*, (Androscoggin County CV-76-301). The defendants argue that the plaintiffs' claims, even if brought as shareholders of the closely held corporation R.D. Realty, are barred because of decisions in two lawsuits in the United States District Court for the District of Maine.

The underlying dispute concerns a land transaction between R.D. Realty Corporation and Roger Dube concerning

valuable real estate at Parker Head in Phippsburg. At the trial on September 2, 1974 a letter was introduced, without objection, which indicated that Dube had warned Robert Spickler, as president of R.D. Realty, that payment was due and foreclosure was possible. The jury, for whatever reason, found for Dube and against R.D. Realty. A request for a new trial was denied and that decision upheld. *See Spickler v. Dube*, 463 A.2d 739 (Me. 1983).

Actions were brought in the United States District Court alleging that the letter was fraudulently produced as a result of a joint effort between Dube and the Levensons, his attorneys, and that as a result of perjured testimony, the jury reached the wrong verdict.

The central suit, *Spickler v. Dube, et al.*, 84-0059P, resulted eventually in a dismissal for want of prosecution. That dismissal was upheld by the First Circuit Court of Appeals on June 22, 1988. Also see the dismissal of the claims of Olive spickler in *Spickler v. Levenson*, CV-86-0101P and the affirmation of the dismissal by the First Circuit on January 18, 1989.

As the decision in the federal suits has been affirmed and are either a dismissal with prejudice or a judgment for the defendants, the defendants argue that the current claims, from the same transaction, cannot be maintained in the Superior Court. I agree. *See Beegan v. Schmidt*, 451 A.2d 642, 644 (Me. 1982).

The fact that this action was brought as a shareholder derivative action makes no difference given the close

connection between the Spicklers, as majority stockholders and officers of R.D. Realty, and R.D. Realty.

The final issue is whether an injunction should issue against further litigation surrounding the Parker Head property. Unfortunately such an injunction must issue given the never ending litigation and great cost. The transactions involving R.D. Realty and Dube took place a long time ago and must be finally put to rest.

Wherefore the entries shall be:

1. Defendants' motions for summary judgment of February, 1989 are GRANTED.

2. Defendant Roger P. Dube's motion for summary judgment of March 7, 1989 is GRANTED.

3. Judgment for the defendants on the amended complaint.

4. Plaintiffs Robert and Olive Spickler, R.D. Realty Corp., their agents or persons acting in concent [*sic*] with them, are hereby enjoined permanently from filing any complaint in any Maine Court relating to the transactions involving the Dube/R.D. Realty mortgages on the so-called Parker Head Land, *R.D. Realty Corp. v. Roger Dube*, CV-76-301, the Federal Court lawsuits *Robert Spickler v. Roger Dube, et al.*, 84-0059P and *Olive Spickler v. Alan Levenson*, 86-1010P, these consolidate [*sic*]

actions 86-626 and 86-967 and *Robert Spickler v. Alan Levenson*, 86-641, including, but not limited to, lawsuits accusing Roger P. Dube, Alan J. Levenson (individually or as administrator), agents of a party (including attorneys, law offices or employees of law offices), judges or witnesses in this or any of the aforementioned proceedings, of perjury, fraud or falsifying evidence, unless the plaintiffs, before they file any further action, satisfy a justice of this court that the action they seek to file presents at least a *prima facie* case.

5. This Order and Decision may be incorporated by reference on the docket.

DATED: June 1, 1989

/s/ Paul A. Fritzsche
PAUL A. FRITZSCHE
Justice, Superior Court

APPENDIX B

[NOT FOR PUBLICATION]

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 87-1833 ROBERT D. SPICKLER,
Plaintiff, Appellant,
v.
ROGER P. DUBE, *et al.*,
Defendants, Appellees.

No. 87-1962 ROBERT D. SPICKLER,
Plaintiff, Appellant,
v.
ROGER P. DUBE,
Defendant, Appellee.

No. 87-1963 ROBERT D. SPICKLER,
Plaintiff, Appellant,
v.
ROGER P. DUBE, *et al.*,
Defendants, Appellees.

ALAN J. LEVENSON, *etc.*,
Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

[Hon. A. David Mazzone*, *U.S. District Judge*]

Before
Campbell, *Chief Judge*,
Breyer and Selya, *Circuit Judges*.

Robert D. Spickler on brief *pro se*.

Daniel F. Gilligan, Harrison L. Richardson and Richardson & Troubh on brief for *appellees*.

June 22, 1988

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*Of the District of Massachusetts, sitting by designation.

[Excerpt]

PERMANENT INJUNCTION

Spickler also challenges the court's grant of defendants' motion to enjoin him from filing any further lawsuits in federal district court involving the transaction in issue without certification by a district court judge that he has presented a *prima facie* case. It is well settled that a court may issue injunctions where the plaintiff has subjected a defendant to baseless, vexatious and repetitive suits. *Gordon v. United States Department of Justice*, 558 F.2d 618 (1st Cir. 1977); *Clinton v. United States*, 297 F.2d 889 (9th Cir. 1961).

In the instant case, the court found that these defendants have been hauled into court by appellant on various occasions to defend against what is essentially the same claim and that this action was brought in bad faith and for the purpose of harassing the defendants. In light of the history of litigation between the parties, we see no reason to disagree with these findings. We do not believe that defendants must be subjected to an endless number of repetitive lawsuits. Each time a plaintiff brings a frivolous or repetitive lawsuit, defendants are injured by having to bear the cost of defending themselves. The district court properly exercised its powers to prevent abuse of the litigation process.

We note that the district court did not bar appellant from suing these defendants on a meritorious claim; rather it devised a screening process which will protect the defendants from having to defend against baseless claims.